No. 17377

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN ARTHUR LUOMOLA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

FRANCIS C. WHELAN,
United States Attorney,

THOMAS R. SHERIDAN,
Assistant United States Attorney,
Chief, Criminal Division,

MEYER NEWMAN,
Assistant United States Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 17377

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN ARTHUR LUOMOLA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.
JURISDICTIONAL STATEMENT.

The Government incorporates herein appellant's jurisdictional statement as set forth in his Brief on Behalf of Appellant[1] at pages 1 and 2.

II.
STATEMENT OF THE CASE.

Appellant was found guilty after trial by jury of the illegal importation of marihuana.

The appeal is concerned with the nature and effect of certain remarks made by the prosecutor in his closing argument to the jury and with the Court's refusal on the date set for sentencing and judgment to postpone said sentencing in order that a new attorney al-

---

[1]Hereinafter referred to as App. Br.

legedly retained by the appellant might present certain information or make certain motions to the Court.

It should be noted that as these are the only issues under consideration and as no objection is raised based on the sufficiency of the evidence, or the commission of error during the trial, it is deemed unnecessary to present any exhaustive statement of the facts.[2]

In considering the appellant's statement of the case (App. Br. 2-3), the appellee must take exception to certain language employed in said statement. The prosecutor did not make "certain remarks which implied to the jury that appellant had trafficked in narcotics or marihuana on prior occasions" (App. Br. 2) nor were the prosecutor's comments "prejudicial statements" as stated therein (*ibid.*). An analysis of the prosecutor's remarks as presented in our Argument (IV *infra,* indicates that there was no such implication made—the remarks were merely fair comment in response to an argument made by counsel for the appellant and the prosecutor stated that he had no evidence that the appellant had ever "smuggled before" and that he didn't mean to suggest "that he had such evidence."[3]

---

[2]In this connection it should be noted that the Reporter's Transcript of Proceedings on appeal (hereinafter referred to as R. T.) includes only the arguments of counsel before the jury. The remaining pertinent portion of the proceedings which concerns the occurrences on the date of sentencing is before this Court as Exhibit A, 29-37 (annexed to App. Br.).

[3]The portion of appellant's argument to which the prosecutor responded is set forth in R. T. 8-10, the response is at pp. 13-14 *ibid.* and note particularly the statement by the Court that the prosecution was within its rights in commenting since the defense had "opened up" the subject in its argument (*ibid.* 14).

III.
QUESTIONS PRESENTED.

1. Were the remarks of the prosecutor in his closing argument of such a prejudicial nature as to call for a mistrial?

2. Was it mandatory that the trial court postpone sentencing and judgment on the date set therefor and to grant a continuance to the appellant on his representation, made for the first time on that date, that he had retained new counsel who would present certain "motions" to the Court?

IV.
ARGUMENT.

A. The Prosecutor's Remarks in His Closing Argument Did Not Constitute Prejudicial Misconduct.

The prosecutor's remarks [R. T. 13, 14] to which the appellant objects were properly made in response to one of the appellant's arguments. In order to understand why the prosecutor's remarks were necessary and proper one must first read the argument made by the appellant, particularly that portion [R. T. 8-10] which implies that smugglers have a certain set way of behaving and that because appellant's behavior pattern was a little unorthodox, it should make the inference that the appellant could not be a smuggler. In response, the prosecutor merely suggested that smugglers did not have any set pattern and that each case should be decided on its own facts [R. T. 13].

The cases are legion in support of the proposition that fair comment on an argument "opened up" by the defense is proper and that in many cases this "invited" argument is proper even though it might be improper if made in the first instance by the prosecution.

An important case in point in this circuit is *Schino v. United States,* 209 F. 2d 67, 71, 72 (1953), *cert. denied* 347 U. S. 937, in which this Court stated with reference to a criticized argument of Government counsel:

> "It was made in reply to the argument of Schino counsel, in which he tried to picture Schino as an officer of the Bureau who was doing his duty and who was not involved in any wrongdoing and thus invited a rebuttal argument of this nature. An

> argument to the jury which is based upon the evidence or upon reasonable inferences therefrom, or *which even though otherwise improper, is in reply to such an argument* as made by Schino's counsel as proper. Ocha v. United States, 9 Cir., 167 F. 2d 341, Springer v. United States, 9 Cir., 148 F. 2d 411, 414." (Emphasis supplied.)

A statement to similar effect appears in *United States v. Achilli,* 234 F. 2d 797, 802 (7th Cir. 1956), affd. 353 U. S. 373 (1957), where the Court in concluding that Government counsel's argument, when considered as a whole, represented nothing more than zealous advocacy and did not require a reversal, stated:

> ". . . As we said in United States v. Doyle, No. 11528, 7 Cir., 234 F. 2d 788, 796, quoting from Malone v. United States 7 Cir., 94 F. 2d 281, 288, certiorari denied 304 U. S. 567, 58 S. Ct. 944, 82 L. Ed. 521, " 'Counsel has a right to make any argument based upon evidence proven in the case, or which may be reasonably inferred therefrom *and to make reply to that made by opposing counsel,* and in doing so, statements may be made which otherwise would be improper . . .' " (Emphasis supplied.)

Many other cases which have considered the problem of "invited argument" have employed language similar in vein to that in the *Schino* and *Achilli* cases, *supra,* and have held that considerable latitude is allowed to counsel in meeting the arguments of opposing counsel.

See:

> *Brennan v. United States,* 240 F. 2d 253, 263 (8th Cir. 1957);

Ochoa v. United States, 167 F. 2d 341, 344 (9th Cir. 1948);

Springer v. United States, 148 F. 2d 411, 414 (9th Cir. 1945);

Schmidt v. United States, 237 F. 2d 542, 543, 544 (8th Cir. 1956);[4]

Green v. United States, 282 F. 2d 388 (9th Cir. 1960).

It is submitted that an examination of the cases and authorities cited by the appellant (App. Br. 5, 6, 8) indicate that none are in point or bear any relation to the circumstances concerned in the instant case.

Michaelson v. United States, 335 U. S. 469 (1948), cited by the appellant (App. Br. 5) and the Wigmore and McCormick references (App. Br. 6) are concerned with the introduction of evidence and stand for the proposition that evidence of the bad character of an accused cannot be introduced unless the defense first attempts to introduce evidence of good character. Here we have no attempt to introduce evidence of any bad character—as a matter of fact, at two separate stages of his argument, one before and one after the defense objection—the prosecutor stated that there was no evidence that he did ever smuggle before.[5]

---

[4]The Court in *Schmidt* employed the following language:
". . . and therefore the criticized argument of the Government's counsel was provoked and invited, and hence, in the circumstances was not improper [citing cases]."

[5]See R. T. 13, "We don't have any reason, any evidence, that indicates that he has, before you. You are only concerned with the offense charged, with the one count he is charged with in this particular case"; and then after the objection at 14, "Well, in fairness to the defendant, I have no evidence that he has smuggled before. I didn't mean to suggest that I had. I was only

We can, of course, find no fault with the language in *Berger v. United States,* 295 U. S. 78 (1935), quoted at Appellant's Brief pages 6 and 7, but it is submitted that the remarks of counsel which are complained of here bear little parallel to the conduct of the prosecutor in *Berger,* which the Supreme Court found to be "pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential" (*Berger, supra,* 89).[6]

Similarly with the other cases cited by the appellant (App. Br. 8). In *Leonard v. United States,* 277 F. 2d 834 (9th Cir. 1960), the prosecutor, in his opening statement, spoke of 83 other crimes which he could prove the defendant committed, in addition to the one with which defendant was charged and a blackboard on which the alleged crimes were detailed was kept in view of the jury throughout the trial.

In *Nalls v. United States,* 240 F. 2d 707, 709, 710 (5th Cir. 1957), the prosecutor stated to the Court in the presence of the jury that there were three witnesses who had been subpoenaed, but the Government would not put them on because their testimony would be cumulative.

In *Hanford v. United States,* 249 F. 2d 295 (5th Cir. 1957); which concerned a few bottles of untaxed

---

commenting on his comments on what standard smugglers and standard conduct of smugglers may be or may not be: I am suggesting they are all different and have to be decided on their own facts."

[6]For a general idea of the tactics censured in *Berger,* see pp. 84 and 85 of the Opinion. The Court discusses misstatement of facts in cross-examination, bullying and arguing with witnesses, assuming prejudicial facts not in evidence, insinuations and undignified and intemperate argument to the jury, etc., certainly not by any stretch of the imagination can it be said that this resembles the conduct of the prosecutor in this case.

liquor, the impression was sought to be conveyed that because of this, the defendant was in some manner responsible for the fact that too many of the prosecutor's friends and friends' children get run over on the highways (*Handford, supra,* 298).

In *Ginsberg v. United States,* 275 F. 2d 950 (5th Cir. 1958), the prosecutor argued that though none had testified during the trial, the evidence of 50 other witnesses were available to contradict the four witnesses who had testified to the defendant's good character.

It is submitted that all of these cases cited by the appellant concern insinuations that certain damaging evidence was available which could be used against a defendant and that they, therefore, bear little relationship to this case where government counsel introduced all the evidence which was available to him and stated that he had no further damaging evidence to offer other than that which had been introduced at the trial.

In the remaining case which the appellant cites, that of *Chavez v. United States,* 275 F. 2d 813 (9th Cir. 1960), App. Br. 8, the judgment of conviction was reversed because of insufficient evidence; there was also dicta to the effect that some of the evidence had been improperly introduced and the case is therefore not in point in here where the evidence was sufficient for conviction and where no improper evidence was introduced.

It is submitted, therefore, that because the prosecution was simply commenting on a matter "opened up" and invited by the defense, and was attempting merely to negate the inference sought to be conveyed to the jury that the appellant was not guilty of smuggling

because he did not look and act as a smuggler should, its remarks were proper in their context and the trial court ruled correctly in overruling the defense's objection to them [T. R. 13, 14].

B. The Trial Court Committed No Error in Refusing to Grant a Continuance to the Appellant, Prior to Judgment and Sentencing.

It should be noted that appellant was found guilty on December 21, 1960, Transcript of Record on Appeal,[7] page 17; and that the case was referred to the Probation Officer for a pre-sentence report and continued until January 16, 1961 for hearing, report, sentence, and ruling on motions [T. R. 16]. There is no evidence in the record before this Court that during the time which intervened either the Court or the Court appointed counsel which had represented him ably during the trial had ever been put on notice that the appellant had retained a new counsel to represent him in connection with proceedings subsequent to trial.[8]

It should be noted also that appellant's court appointed counsel had moved for a new trial on December 27, 1960 [T. R. 18], and that the matter was heard and decided on January 16, 1961 [T. R. 22, 25], and that at no time had any newly retained counsel appeared, co-operated or served notice of his retention to the Court.

In the circumstances, the Court acted properly and within its sound judicial discretion in refusing a continuance and proceeding to pronounce judgment.

---

[7]Hereinafter referred to as T. R.

[8]Mr. Sheela, the Court appointed counsel, stated to the Court on January 16, 1961, ". . . 'this is the first time I knew he had retained an attorney at this point' " [App. Br., Ex. A, p. 30].

The appellant has cited no authority to the contrary. The cases cited by the appellant (App. Br. 9, 10) all concern the right of the accused to counsel during every stage of a criminal proceeding and it submitted that appellant was at all times so represented, even during the proceedings on January 16, 1961.

The record indicates that the Court further protected the appellant by declining to relieve his court appointed counsel and by requesting counsel on its own motion to investigate as to whether appellant had retained other counsel and to make any further proper motions if necessary [R. T. 25]. The Court also called the attention of the appellant and his counsel to the fact that if anything developed later on, the judgment could be vacated (App. Br. Ex. A, p. 30).

It is apparent therefore that the Court's decision to enter the judgment on the day set therefore in no conceivable way was to the appellant's prejudice.

V.
CONCLUSION.

There was no reversible error connected with any of the proceedings incident to appellant's trial and judgment and his conviction should therefore be affirmed.

Respectfully submitted,

FRANCIS C. WHELAN,
United States Attorney,

THOMAS R. SHERIDAN,
Assistant U. S. Attorney,
Chief, Criminal Division,

MEYER NEWMAN,
Assistant U. S. Attorney,

Attorneys for Appellee.